

November 17, 2017

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation: *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108.

Dear Ms. Dortch:

On November 16, 2017, Marianela López-Galdos, Director of Competition & Regulatory Policy, and the undersigned of the Computer & Communications Industry Association (CCIA) met with Claude Aiken, Legal Advisor, Wireline, for Commissioner Clyburn. The CCIA representatives discussed the Commission's pending *NPRM* in the proceeding referenced above¹ and shared a copy of a recent op-ed featured in *The Hill* that was written by CCIA's President & CEO, Ed Black, and we have included a copy with this filing.²

The CCIA representatives explained how for over four decades, CCIA has stood for open markets and competition. Over the past two decades, CCIA has advocated for strong rules to protect the open Internet as an unparalleled engine for innovation, education, commerce, and free speech. However, CCIA has serious concerns with the direction the Commission appears set to take with a Report and Order on the *NPRM*. Despite this proceeding's sobriquet, the Commission's action would actually restrict the Internet freedom that consumers have enjoyed since the dawn of the commercial Internet over twenty years ago. It would result in massive changes to the Internet ecosystem as the Commission would abdicate its authority and eviscerate open Internet rules that the D.C. Circuit upheld just one year ago.³

The CCIA representatives reiterated arguments from CCIA's comments, particularly a concern that the FCC has based its proposed action in the *NPRM* on two overly-simplistic data reviews,⁴ and expanded on arguments made in CCIA's reply comments:⁵

¹ *In the Matter of Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108 (rel. May 23, 2017) ("*NPRM*").

² Ed Black, *The business reasons why the FCC — not FTC — should enforce Open Internet rules*, THE HILL (Oct. 31, 2017), <http://thehill.com/blogs/congress-blog/technology/357894-the-business-reasons-why-the-fcc-not-ftc-should-enforce-open>.

³ *U.S. Telecom Ass'n v. Fed. Comm'n Comm'n (USTelecom)*, 825 F.3d 674 (D.C. Cir. 2016).

⁴ Comments of CCIA at Sec.II., WC Docket No. 17-108 (July 17, 2017).

⁵ Reply Comments of CCIA at Sec.IV., WC Docket No. 17-108 (Aug. 28, 2017).

- **The Federal Trade Commission (FTC) Cannot Effectively Enforce BIAS Nondiscrimination Rules.**

In response to the questions raised in the *NPRM*,⁶ CCIA explained critical differences between the FCC and FTC: their respective jurisdictions, their regulatory authorities, and how they actually utilize their respective capabilities. While some have claimed in this proceeding that the FTC would be able to fill the void if the FCC abdicated its authority,⁷ the FCC and FTC are simply two different agencies that do two different things. If the FCC were to abdicate its authority, as it appears ready to do, the FTC would not be able to proscribe BIAP discrimination in the same way the FCC can now. Ultimately, consumers and small businesses would be harmed due to the lack of effective oversight.

Congress empowered the FCC with the ability to write *ex ante* rules to prevent certain behaviors by communications providers. Congress did not give the FTC nearly the same rulemaking authority; instead, Congress empowered the FTC with mostly *ex post* enforcement authority. The *ex ante* - *ex post* distinction is important and helps explain why the FTC would not be able to fill the void that the FCC would leave. A BIAP, by virtue of its controlling a bottleneck through which content must pass to reach subscribers, has the ability to arbitrarily block, throttle, or otherwise discriminate against traffic flowing through its network. The FCC can set rules of the road that all market participants must follow, but the FTC does not have the same ability for it generally can only act to rectify a harm *after* it has occurred.

- **The FTC's Section 5 Authority is Insufficient.**

Though the FTC has a history of using Section 5 of the FTC Act to protect consumers from unfair or deceptive acts and practices in data security and privacy,⁸ its authority and more importantly its application show that Section 5 is insufficient for policing the actions of BIAPs. Section 5 of the FTC Act prohibits unfair methods of competition, including conduct that violates either the antitrust laws or Section 5 standing alone. However, it is unclear whether Section 5 of the FTC Act will be used to address competition concerns on the Internet.⁹ The FTC has a history of being unsuccessful in litigating Section 5 unfair methods of competition cases, so, even if the FTC endeavored to take action to protect consumers and opened a case to address discriminatory anticompetitive conduct, for example if a BIAP began arbitrarily blocking or throttling content from a competitor, the FTC would probably be unsuccessful. Therefore,

⁶ *NPRM* at ¶ 108; *NPRM* at ¶ 50, Sec. IV.

⁷ See, e.g., Comments of NCTA at Sec. II.A., WC Docket No. 17-108 (July 17, 2017); Comments of U.S. Chamber of Commerce at 8, WC Docket 17-108 (July 17, 2017).

⁸ See generally *Privacy and Security*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/business-center/privacy-and-security>.

⁹ See *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act*, FED. TRADE COMM'N (Aug. 15, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

there is little that the FTC can do to protect consumer welfare from BIAPs if they engage in discriminatory practices. Furthermore, it is unclear whether the FTC could bring a case even if the FCC reverses the *Open Internet Order* because the 9th Circuit's current ruling in *FTC v. AT&T Mobility* holds that the common carrier exemption to FTC enforcement is status-based, rather than activities-based.¹⁰

- **The FTC Has Expertise on Data Security and Privacy but Not Communications Networks.**

The FTC staff explained in comments in this proceeding that it has an ability to address data security and privacy issues that could be implicated by the practices of BIAPs.¹¹ However, the FTC's experience policing data security and privacy under the unfair or deceptive acts or practices prong of Section 5 is not analogous to policing the treatment of traffic going through a communications network under the unfair methods of competition prong of Section 5.¹² Congress clearly created the FCC to be the agency of the Federal government that oversees communications networks,¹³ and the FCC has developed the more relevant expertise as the communications regulator over the past nine decades.

- **It Would be Inappropriate to Bundle Competition and Network Enforcement Within the FTC.**

In the words of the late Republican Commissioner Rosch, "given its institutional design, the FTC may not be well suited to deal with the subject of internet neutrality."¹⁴ Indeed, the FTC was designed to protect consumers either from market failures in the form of anticompetitive conduct and from market failures in the form of deceptive acts. Thus, with the bundled competition and consumer protection mandates, the FTC aims to protect consumers. However, there are limited international experiences with institutional design that have successfully bundled regulatory agencies with the competition institutions. Most notably, Spain underwent an institutional transformation in 2013 when it merged, under a single entity, the competition and regulatory authorities, including the telecommunications agency. The incoherence in the pursuit

¹⁰ Fed. Trade Comm'n v. AT&T Mobility, L.L.C., 835 F.3d 993, 2016 U.S. App. LEXIS 15913 (9th Cir. 2016), *rehearing en banc granted*, 2017 U.S. App. LEXIS 8236 (9th Cir. 2017).

¹¹ Comments of Thomas B. Pah, Fed. Trade Comm'n Bureau of Consumer Protection, Acting Director, et al. at 13, WC Docket No. 17-108 (July 17, 2017).

¹² 15 U.S.C. § 45(a) (2012).

¹³ 47 U.S.C. § 151 (2012).

¹⁴ "Neutral on Internet Neutrality: Should There Be a Role for the Federal Trade Commission?," Remarks of J. Thomas Rosch Commissioner, Fed. Trade Comm'n (Nov. 7, 2011), http://globalforum.items-int.com/gf/gf-content/uploads/2014/04/Thomas_Rosch_SPEACH.pdf.

of goals, among other things, has resulted in an unsuccessful experience in Spain where the Spanish executive has already initiated the legislative steps to unbundle the institutions.¹⁵

This letter is being provided to your office in accordance with Section 1.1206 of the Commission's rules.

Respectfully submitted,

/s/ John A. Howes, Jr.
Policy Counsel
Computer & Communications
Industry Association (CCIA)
655 15th Street, N.W. Suite 410
Washington, D.C. 20005
(202) 783-0070
jhowes@ccianet.org

cc:
Claude Aiken

¹⁵ “CONSULTA PÚBLICA PREVIA Anteproyecto de Ley XX/201X, sobre la racionalización y ordenación de los organismos supervisores de los mercados y para la mejora de su gobernanza”, Spanish Ministry of Economy, Public Consultation on the New Act to reform the competition and markets authority commission, *available at* http://www.mineco.gob.es/stfls/mineco/economia/ficheros/pdf/170301_consulta_publica_AAI.pdf.



The business reasons why the — not FTC — should enforce Open Internet rules

BY ED BLACK, OPINION CONTRIBUTOR — 10/31/17 04:15 PM EDT

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The Internet—and all businesses that rely on it—faces a critical decision point in December. The FCC is expected to vote along party lines to stop enforcing rules that have prevented Internet service providers from discriminating against different kinds of Internet traffic and services.

For Internet users, Open Internet rules have meant they are equally likely to find newer companies and services when browsing the web—and for startups this has meant survival.

Open Internet rules give new start ups the same ability to reach consumers on the Internet as bigger, established companies. When the FCC votes to give up its role enforcing so-called net neutrality rules, bigger companies can make deals with companies like AT&T and Comcast to have faster Internet speeds than their competitors to attract consumers -- a feature that's not likely in the budget of the next Facebook or YouTube.

At a congressional [hearing](#) Wednesday, we will no doubt hear that it's fine for the FCC to [give up its net neutrality enforcement powers](#)—that the Federal Trade Commission can handle complaints of digital discrimination. But there are several big legal problems with that, and that's why the biggest ISPs favor this idea.

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First, the FTC doesn't have the authority to effectively enforce nondiscrimination rules for broadband and ISPs. Pursuant to existing Federal Appeals Court decisions, the Federal Trade Commission Act is deemed to exempt common carriers from FTC jurisdiction, which means that because most major ISPs provide common carrier telephony services (think your home landline) in addition to Internet access, they will remain outside of FTC jurisdiction.

Second, the FTC's regulatory and enforcement capabilities do not map well to managing network traffic, like the Internet. Congress actually created the FCC to do that as the regulator of communications networks. The FTC has authority over unfair methods of competition and deceptive trade practices, so it has the expertise to jump in on privacy problems—after they've happened. But that expertise is no substitute for the FCC's rules when it comes to preventing blocking, throttling, and discrimination online before they harm innovative startups and Internet users—authority that was [upheld](#) just one year ago by a Federal Appeals Court.

So once the FCC rescinds its non-discrimination rules, which it plans to do in December, an ISP could theoretically promise in its service terms to treat similar Internet traffic equally; however, because there will be no legal requirement to do so, Internet users will have no guarantees.

Third, what little enforcement jurisdiction the FTC does have, would not happen until after a problem has been reported. As FTC Commissioner Terrell McSweeney has [pointed out](#), this after the fact enforcement cannot adequately detect and prevent instances of anticompetitive harm in networks. Just as important, identifying instances of ISPs blocking or interfering with users' expression after it occurs does not change the fact that the users have been harmed.

As FTC Commissioner McSweeney [pointed out](#) before the Judiciary Committee on this same issue in 2015, trying to enforce discrimination against Internet traffic using antitrust rules after the problem has happened requires multiple steps and a longer time table. "Antitrust enforcement, on the other hand, would require detection, investigation, and a potentially lengthy 'rule of reason' analysis," Sweeney said. As investors calculate risk for smaller businesses and start-ups, they will now have to guess whether a company reliant on Internet traffic will still be in business after an FTC investigation is complete.

This is a very different business climate for start-ups when compared to one with an FCC setting out enforceable open Internet rules to provide notice of acceptable conduct in advance. This helps smaller businesses and startups take advantage of Internet access to be confident that their services will reach a wide, diverse audience of users. This climate is predictable and allows them to attract investors.

The [public interest reasons](#) to maintain non-discrimination on the Internet are hopefully well understood after years of debate, not to mention the [comments](#) from over 22 million people who weighed in on the importance of the FCC's current open Internet rules. Despite widespread public support of the existing rules, this FCC has already declared its plans to favor the business models of a couple incumbent ISPs—rather than the needs of Internet users and the hundreds or thousands of businesses that use the Internet.

As Congress holds this hearing on the open Internet, we hope two things are clear. One, small businesses and start-ups rely on the open Internet to reach customers with innovative new services and to create jobs. Two, the

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FTC just can't protect consumers, businesses and the open Internet like the FCC can.

Ed Black is president and CEO of the Computer & Communications Industry Association.



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